

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

SHANNON L. CARROLL,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security

Defendant.

CASE NO. 3:15-CV-05526-DWC

ORDER ON PLAINTIFF'S  
COMPLAINT

Plaintiff filed this action, pursuant to 42 U.S.C § 405(g), seeking judicial review of the denial of Plaintiff's applications for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") benefits. The parties have consented to proceed before a United States Magistrate Judge. *See* 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13. *See also* Consent to Proceed before a United States Magistrate Judge, Dkt. 6.

After reviewing the record, the Court concludes the Administrative Law Judge ("ALJ") erred by failing to properly evaluate the medical opinions from one of Plaintiff's examining psychologists and two of the state agency medical consultants. Therefore, this matter is reversed and remanded, pursuant to sentence four of 42 U.S.C. § 405(g), for further proceedings.

**PROCEDURAL& FACTUAL HISTORY**

On August 3, 2012, Plaintiff filed applications for DIB and SSI. *See* Dkt. 9, Administrative Record (“AR”) 273-282. Plaintiff alleges she became disabled on August 16, 2010, due to a range of impairments, including depression, anxiety, post-traumatic stress disorder, borderline personality disorder, irritable bowel syndrome, arthritis in hips and back, and numbness in her feet and legs. *See* AR 378. Plaintiff’s applications were denied upon initial administrative review and on reconsideration. *See* AR 102, 103, 160, 161. A hearing was held before ALJ David DeLaittre on August 27, 2013, at which Plaintiff, represented by counsel, appeared and testified. *See* AR 33.

On September 24, 2013, the ALJ found Plaintiff was not disabled within the meaning of Sections 1614(a)(3)(A), 216(i), and 223(d) of the Social Security Act. AR 23. Plaintiff’s request for review of the ALJ’s decision was denied by the Appeals Council on May 26, 2015, making that decision the final decision of the Commissioner of Social Security (the “Commissioner”). *See* AR 1, 20 C.F.R. § 404.981, § 416.1481. On July 29, 2015, Plaintiff filed a complaint in this Court seeking judicial review of the Commissioner’s final decision.

Plaintiff argues the denial of benefits should be reversed and remanded for further proceedings, because the ALJ erred by: 1) failing to properly evaluate the medical opinion evidence; 2) failing to properly evaluate Plaintiff’s testimony; 3) failing to properly evaluate the lay witness evidence; 4) failing to properly assess Plaintiff’s residual functional capacity (“RFC”); and 5) basing his findings at Step Five of the sequential evaluation on an incomplete RFC. Dkt. 13, p. 1. Plaintiff also argues the Commissioner violated Plaintiff’s constitutional right to procedural due process by failing to incorporate 58 pages of additional medical records which

were submitted to—but not considered by—the Appeals Council, into the administrative record.  
Dkt. 13, pp. 1-2.

### **STANDARD OF REVIEW**

Under 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits only if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)). “Substantial evidence” is more than a scintilla, less than a preponderance, and is such ““relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”” *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989) (quoting *Davis v. Heckler*, 868 F.2d 323, 325-26 (9th Cir. 1989)).

### **DISCUSSION**

#### **I. Whether the ALJ Properly Evaluated the Medical Opinion Evidence.**

##### **A. Standard**

The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted opinion of either a treating or examining physician or psychologist. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988); *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990)). However, “[i]n order to discount the opinion of an examining physician in favor of the opinion of a nonexamining medical advisor, the ALJ must set forth specific, *legitimate* reasons that are supported by substantial evidence in the record.” *Nguyen v. Chater*, 100 F.3d 1462, 1466 (9th Cir. 1996) (citing *Lester*, 81 F.3d at 831). The ALJ can accomplish this by “setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*, 881 F.2d at 751). In addition, the ALJ must

1 explain why the ALJ's own interpretations, rather than those of the doctors, are correct. *Reddick*,  
 2 157 F.3d at 725 (citing *Embrey*, 849 F.2d at 421-22). The ALJ "may not reject 'significant  
 3 probative evidence' without explanation." *Flores v. Shalala*, 49 F.3d 562, 570-71 (9th Cir. 1995)  
 4 (quoting *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984) (quoting *Cotter v. Harris*, 642  
 5 F.2d 700, 706-07 (3d Cir. 1981))). The "ALJ's written decision must state reasons for  
 6 disregarding [such] evidence." *Flores*, 49 F.3d at 571.

### 7 **B. Application of Standard**

8 The ALJ assigned Plaintiff the RFC to perform light work, which is defined as lifting  
 9 and/or carrying up to twenty pounds occasionally and ten pounds frequently, standing and/or  
 10 walking up to two hours and sitting up to six hours all within an eight hour work day with  
 11 normal breaks. AR 18. The ALJ also limited Plaintiff to work with things and not people, found  
 12 Plaintiff should not work in a team work environment, but is capable of working independently  
 13 with some supervision, and is capable of performing simple repetitive tasks. AR 18. Plaintiff  
 14 contends this RFC finding was erroneous, as the ALJ improperly rejected the more restrictive  
 15 limitations contained in medical opinions rendered by two examining psychologists, Dr. Terilee  
 16 Wingate and Dr. Jesse McClelland and four non-examining, consulting psychologists and  
 17 physicians, Dr. Eugene Kester, Dr. Thomas Clifford, Dr. James Bailey, and Dr. Norman Staley.

#### 18 **1. Terilee Wingate, Ph.D.**

19 Dr. Wingate examined Plaintiff on October 18, 2012. AR 503. During the examination,  
 20 Plaintiff reported emotional lability, anger management issues, and other depressive symptoms.  
 21 AR 503-05. On mental status examination, Plaintiff presented with dysphoric mood and blunted  
 22 affect, completed five digits forward but only three backward, and made errors during serial 7's.  
 23 AR 505. Dr. Wingate also administered the Rey 15 factor test (a screening test for memory  
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1 malingering), the results of which suggested Plaintiff “may not be performing at an optimum  
2 level on the mental status examination.” AR 505. Dr. Wingate diagnosed Plaintiff with anxiety  
3 disorder NOS and borderline personality disorder (primary diagnosis). AR 506. Dr. Wingate  
4 opined Plaintiff would be able to understand, remember, and complete simple and routine tasks,  
5 and might be able to do complex tasks. AR 506. However, Dr. Wingate also opined Plaintiff  
6 would have difficulty sustaining a daily and weekly work schedule without interruption from her  
7 mood and anger issues, would have poor stress tolerance and strike out verbally when demands  
8 are placed upon her, and would have difficulty interacting with coworkers or the public. AR 506-  
9 07.

10 The ALJ gave Dr. Wingate’s opinion significant weight. AR 20. Importantly, the ALJ  
11 cited Dr. Wingate’s opinion Plaintiff would be capable of understanding, remembering, and  
12 completing simple and routine tasks, and would have difficulty interacting with coworkers or the  
13 public, but failed to cite Dr. Wingate’s opinion Plaintiff would have difficulty sustaining a daily  
14 and weekly work schedule without interruption from her mood and anger issues, and failed to  
15 incorporate this limitation into Plaintiff’s RFC. AR 18, 20. Plaintiff argues this was harmful  
16 error, and the Court agrees.

17 An ALJ is not required to adopt the opinion of an examining physician or psychologist;  
18 however, in order to reject all or part of a medical opinion, an ALJ must offer at least a specific  
19 and legitimate reason for doing so. *See Nguyen*, 100 F.3d at 1466 (*citing Lester*, 81 F.3d at 831).  
20 *See also Flores*, 49 F.3d at 571 (an ALJ “may not reject ‘significant probative evidence’ without  
21 explanation.”). An ALJ errs by purporting to give great weight to an examining physician, yet  
22 failing to include all of the physician’s opined limitations into the RFC. *See Betts v. Colvin*, 531  
23 Fed.Appx. 799, 800 (9th Cir. 2013) (finding the ALJ committed reversible error by purporting to  
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1 give great weight to an examining physician, yet failing to include many of the physician's  
2 opined limitations in the RFC). Here, though the ALJ gave great weight to Dr. Wingate's  
3 opinion, the ALJ failed to offer any reason for failing to include her opinion Plaintiff would have  
4 difficulty sustaining a daily and weekly work schedule without interruption from her  
5 psychological symptoms in Plaintiff's RFC. AR 20. The ALJ's failure to incorporate this  
6 limitation into the RFC finding, or otherwise provide a specific and legitimate reason for  
7 rejecting this limitation, renders the ALJ's RFC finding incomplete and unsupported by  
8 substantial evidence. *See Hill v. Astrue*, 698 F.3d 1153, 1162 (9th Cir. 2012); *Betts*, 531  
9 Fed.Appx. at 800.

10 Defendant argues the ALJ was not required to include every facet of Dr. Wingate's  
11 opinion in the RFC, because the ALJ is "responsible for translating and incorporating clinical  
12 findings into a succinct RFC." *Rounds v. Comm'r, Soc. Sec. Admin.*, 807 F.3d 996, 1006 (9th  
13 Cir. 2015) (citing *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1174 (9th Cir. 2008)).  
14 Defendant's argument is inapposite. The medical opinion at issue in *Rounds* included several  
15 specific "treatment recommendations" which the Court found the ALJ was not required to rely  
16 upon. *Rounds*, 807 F.3d at 1006 ("Rounds should (a) avoid math or use a calculator, (b) write  
17 information down and use various memory aids, (c) request that instructions be repeated and  
18 provided both verbally and in writing, and (d) limit customer or public contact."). As the Ninth  
19 Circuit previously noted in *Stubbs-Danielson*, an ALJ may translate a claimant's condition,  
20 including an examining psychologist's opinion which is couched in ambiguous terms, "into the  
21 only concrete restrictions available to him—[another examining psychologist's] recommended  
22 restriction to 'simple tasks.'" *Stubbs-Danielson*, 539 F.3d at 1174. Unlike the situation presented  
23 in *Stubbs-Danielson* and *Rounds*, however, Dr. Wingate's opinion Plaintiff had difficulty in her  
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ability to sustain a daily and weekly work schedule without interruption from her psychological symptoms is precisely the sort of concrete, vocationally-relevant functional restriction an ALJ should consider when formulating an RFC and propounding hypotheticals to a vocational expert. *See, e.g., Ryan v. Commissioner of Soc. Sec. Admin.*, 528 F.3d 1194, 1198 (9th Cir. 2008). *See also, e.g., Betts*, 531 Fed.Appx. at 800; *Morinskey v. Colvin*, 458 Fed.Appx. 640, 641 (9th Cir. 2011); *Craft v. Astrue*, 539 F.3d 668, 678 (7th Cir. 2008). Rather than “translating” Dr. Wingate’s opinion into a succinct RFC, Defendant’s argument would allow the ALJ to effectively read limitations out of a doctor’s opinion by ignoring them entirely.<sup>1</sup>

Because the ALJ did not provide specific and legitimate reasons, supported by substantial evidence, for rejecting Dr. Wingate’s opined limitation Plaintiff would have difficulty in her ability to sustain a daily and weekly work schedule without interruption from her psychological symptoms, the ALJ committed harmful error requiring remand.

## 2. *Jesse McClelland, M.D.*

Dr. McClelland examined Plaintiff on April 15, 2011. AR 478. During her clinical interview, Plaintiff relayed a history of depression and anxiety, as well as physical and psychological abuse. AR 478. On mental status examination, Plaintiff presented with constricted and depressed affect, but was appropriately dressed and well groomed. AR 480. Plaintiff was only able to recall one out of three objects after five minutes, and presented with “fair” judgment

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<sup>1</sup> Defendant cites to a previous decision of this Court to argue an ALJ’s interpretation of medical opinion evidence should not be disturbed when it is “rational.” Dkt. 14, p. 8 (citing *Rost v. Colvin*, No. 15-540, 2015 WL 6829641, at \*4 (W.D. Wash., 2015). However, in *Rost*, the ALJ discounted a physician’s opinion through a rational interpretation of the physician’s examination notes and inconsistencies between those notes and the administrative record. *Rost*, 2015 WL 6829641, at \*4. As the ALJ provided no reasoning whatsoever for excising a vocationally-relevant restriction from Dr. Wingate’s opinion and the RFC, the situation presented in this case is more akin to an impermissible *post hoc* rationalization; one which the Court will not entertain. *See Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1225-26 (9th Cir. 2009)

1 and insight, but otherwise performed within normal limits. AR 480-81. Dr. McClelland  
2 diagnosed Plaintiff with: major depressive disorder, severe, recurrent without psychotic features;  
3 posttraumatic stress disorder, chronic; and Cluster B traits. AR 481. As a result of her  
4 impairments, Dr. McClelland opined Plaintiff retained the ability to perform simple and  
5 repetitive tasks, but may struggle with detailed and complex tasks due to the cognitive effects of  
6 depression and anxiety. AR 482. Dr. McClelland also opined Plaintiff would have difficulty  
7 accepting instructions from supervisors, may struggle to engage appropriately with supervisors,  
8 coworkers, or the public, and may struggle to maintain regular attendance in the workplace and  
9 complete a normal workday/workweek without interruptions from a psychiatric condition. AR  
10 482.

11 The ALJ gave Dr. McClelland's opinion less than full weight for the following reason:

12 [1] Dr. McClelland appears to rely on the subjective complaints of the claimant  
13 rather than his own observations of the claimant. For example, he noted that the  
14 claimant had presented to the appointment on time, that she was well-groomed,  
15 and that she was polite and cooperative. [AR 477-83]. He also noted that the  
16 claimant had good eye contact, and that she presented with normal thought  
17 processes and thought content. [AR 480]. [2] Finally, as noted above, on the  
18 mental status examination administered by Dr. McClelland, the claimant was able  
19 to spell the word "world" both forward and backward, she was able to do simple  
20 mathematical calculations, and she was able to recall one out of three objects after  
21 a five minute delay.

22 AR 480 (numbering added). Plaintiff argues this was not a specific and legitimate reason,  
23 supported by substantial evidence, for giving Dr. McClelland's opinion less than full weight. The  
24 Court disagrees.

25 An "ALJ may reject a treating physician's opinion if it based 'to a large extent' on a  
26 claimant's self-reports that have been properly discounted as incredible. *Tommasetti v. Astrue*,  
27 533 F.3d 1035, 1041 (9th Cir. 2008). However, "when an opinion is not more heavily based on a  
28 patient's self-reports than on clinical observations, there is no evidentiary basis for rejecting the

1 opinion.” *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014). Here, though Dr. McClelland  
2 documented Plaintiff’s self-reported history and complaints, he also documented his own  
3 observations of Plaintiff’s constricted and depressed affect and “fair” judgment. AR 480-81. Dr.  
4 McClelland also indicated he reviewed some of Plaintiff’s medical records, and found Plaintiff’s  
5 report of her history to be consistent with those records. AR 478, 480-81. Finally, Dr.  
6 McClelland administered a mental status examination. *Blessing v. Astrue*, 2013 WL 316153, \*7  
7 (W.D. Wash. 2013) (“Like the physical examination, the Mental Status Examination is termed  
8 the *objective* portion of the patient evaluation.”) (*quoting* Paula T. Trzepacz and Robert W.  
9 Baker, the Psychiatric Mental Status Examination, 3-4 (Oxford University Press 1993)). *See also*  
10 *Gehrman v. Colvin*, 2016 WL 792039, \*4 (W.D. Wash. 2016). In light of the other clinical  
11 evidence supporting Dr. McClelland’s opinion, the mere fact Dr. McClelland considered  
12 Plaintiff’s subjective statements is not a specific and legitimate reason, supported by substantial  
13 evidence, for discounting the opinion.

14       However, the ALJ also explained how Dr. McClelland’s opinions were *inconsistent* with  
15 Dr. McClelland’s objective testing. For example, though Dr. McClelland opined plaintiff would  
16 have difficulties getting along with supervisors, coworkers and the public, would struggle to  
17 maintain attendance, and would struggle with the usual stress encountered in the workplace, the  
18 ALJ noted Plaintiff was on time for her appointment, was well groomed, polite, and cooperative,  
19 maintained normal eye contact, and had normal thought process and content. AR 480. The ALJ  
20 could reasonably interpret Plaintiff’s performance on mental status examination as inconsistent  
21 with Dr. McClelland’s opined limitations. *See Morgan v. Commissioner of Soc. Sec. Admin.*, 169  
22 F.3d 595, 601-02 (9th Cir. 1999); *Tommasetti*, 533 F.3d at 1038. Thus, the ALJ did not err by  
23 giving less than full weight to Dr. McClelland’s opinion.  
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1                                   3. *Eugene Kester, M.D.*

2           Dr. Kester, a state agency medical consultant, reviewed Plaintiff's medical records on  
3 July 26, 2011 and offered an opinion as to Plaintiff's limitations. AR 87. Dr. Kester opined  
4 Plaintiff would have moderate limitations in her ability to: respond appropriately to changes in  
5 the work setting; ask simple questions or request assistance; accept instructions and respond  
6 appropriately to criticism from supervisors, and; get along with coworkers or peers without  
7 distracting them or exhibiting behavioral extremes. AR 87. Dr. Kester also opined Plaintiff  
8 would have moderate limitations in her ability to: "carry out detailed instructions, and complete a  
9 normal workday and workweek without interruptions from psychologically based symptoms and  
10 to perform at a consistent pace without an unreasonable number and length of rest periods." AR  
11 86.

12           Plaintiff argues the ALJ committed harmful error by failing to discuss Dr. Kester's  
13 opinion at all in the written decision. Defendant concedes the ALJ did not cite or reference to Dr.  
14 Kester's opinion in the written decision, but argues the ALJ's failure to discuss Dr. Kester's  
15 opinion was harmless because "Dr. Kester's opinion is consistent with the ALJ's RFC finding."  
16 Dkt. 14, p. 9, n. 4. The Court disagrees. An ALJ's failure to discuss a physician's opinion is not  
17 harmless error. *See Hill v. Astrue*, 698 F.3d 1153, 1160 (9th Cir. 2012). When the ALJ ignores  
18 significant and probative evidence in the record favorable to a claimant's position, the ALJ  
19 "thereby provide[s] an incomplete residual functional capacity determination." *Id.* at 1161. *See*  
20 *also Vincent*, 739 F.2d at 1394-95 (*quoting Cotter v. Harris*, 642 F.2d 700, 706 (3d Cir. 1981)).

21           Defendant cites to *Molina v. Astrue* to argue any error in failing to discuss Dr. Kester's  
22 opinion was harmless, because Dr. Kester's opinion is consistent with the ALJ's RFC finding.  
23 *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012). *Molina*, however, is distinguishable. The  
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1 section of *Molina* cited by Defendant pertains to harmless error in failing to discuss duplicative  
 2 lay witness testimony, rather than medical opinion evidence. *Id.* at 1115-17. Further, unlike lay  
 3 witness testimony, Social Security regulations and rulings require an ALJ to consider *all* medical  
 4 opinions in the record, regardless of source. 20 C.F.R. §§ 404.1520; 404.1527(b) & (c). Thus,  
 5 Dr. Kester's opinion is significant, probative evidence, which the ALJ could not ignore. *See*  
 6 *Vincent*, 739 F.2d at 1394-95 (*quoting Cotter*, 642 F.2d at 706).

7 Even if *Molina* were not distinguishable on this point, Dr. Kester's opinion is not  
 8 consistent with the ALJ's RFC finding. In fact, Dr. Kester's opinion Plaintiff would have  
 9 moderate limitations in his ability to "complete a normal workday and workweek without  
 10 interruptions from psychologically based symptoms and to perform at a consistent pace without  
 11 an unreasonable number and length of rest periods" is consistent with the limitations opined to  
 12 by Dr. Wingate but not included in the RFC. AR 506; Section I(B)(1), *supra*. The consistency of  
 13 a medical opinion with other opinions, as well as the whole record, is a factor an ALJ must  
 14 consider when determining the weight to give to a medical opinion. 20 C.F.R. § 404.1527(c)(4).  
 15 While the ALJ may not necessarily be bound by Dr. Kester's opinion, the ALJ cannot reject it  
 16 through silence; the ALJ must present at least a specific and legitimate reason for doing so. *See*  
 17 *Hill*, 698 F.3d at 1160. Thus, the ALJ's failure to discuss Dr. Kester's opinion was harmful error.

#### 18 4. *James Bailey, Ph.D. and Thomas Clifford, Ph.D.*

19 Plaintiff also alleges the ALJ erred by failing to include all of the limitations opined to by  
 20 two other state agency medical consultants, Dr. Bailey and Dr. Clifford. As with Dr. Wingate,  
 21 the ALJ purportedly gave Dr. Bailey and Dr. Clifford's opinions significant weight, but failed to  
 22 include all of their opined limitations in the RFC. AR 20, 114, 142. Significantly, Dr. Bailey and  
 23 Dr. Clifford also opined Plaintiff would be moderately limited in her ability to complete a normal  
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workday and workweek without interruptions from psychologically based symptoms and perform at a consistent pace without an unreasonable number and length of rest periods. AR 114, 142. Dr. Bailey further explained Plaintiff's "anxiety and depressive symptoms will occasionally interfere with her ability to persist for a normal workday/workweek." AR 114. *See also* AR 142 (Dr. Clifford opined Plaintiff's "anxiety and [sic] symptoms and personality issues will occasionally interfere with her ability to persist for a normal workday/workweek."). As with Dr. Wingate, the ALJ's failure to incorporate these limitations in the RFC, or otherwise offer specific and legitimate reasons to discount these limitations, was harmful error. *See Hill*, 698 F.3d at 1162; *Betts*, 531 Fed.Appx. at 800.<sup>2</sup>

II. Whether the ALJ Provided Specific, Clear, and Convincing Reasons, Supported by Substantial Evidence, for Finding Plaintiff Not Fully Credible.

A. **Standard**

If an ALJ finds a claimant has a medically determinable impairment which reasonably could be expected to cause the claimant's symptoms, and there is no evidence of malingering, the ALJ may reject the claimant's testimony only "by offering specific, clear and convincing reasons." *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996) (citing *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir.1993)). *See also Reddick*, 157 F.3d at 722. However, sole responsibility

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<sup>2</sup> Plaintiff also alleges several other errors in the ALJ's analysis of the medical opinion evidence. For example, Plaintiff alleges the ALJ erred by rejecting GAF scores in the record, as they were, in fact, consistent with Dr. Wingate and Dr. McClelland's opinions. Plaintiff also alleges new evidence submitted to, but not considered by, the Appeals Council, undermines the ALJ's rejection of the opinion of state agency medical consultant Dr. Staley. In light of the fact the case must be remanded for further proceedings, the Court need not address these arguments at this time. However, the Court notes Plaintiff bears the burden of demonstrating how any error in rejecting Plaintiff's various GAF scores caused harm. *See, e.g., VanBibber v. Carolyn [Colvin]*, 2014 WL 29665, at \*3-\*4 (W.D. Wash. 2014). Also, as discussed in Section V, below, the ALJ should consider the newly-submitted evidence on remand. Thus, the ALJ will have an opportunity to consider Dr. Staley's opinion in the context of this evidence.

1 for resolving conflicting testimony and questions of credibility lies with the ALJ. *Sample v.*  
2 *Schweiker*, 694 F.2d 639, 642 (9th Cir. 1999) (citing *Waters v. Gardner*, 452 F.2d 855, 858 n.7  
3 (9th Cir. 1971); *Calhoun v. Bailar*, 626 F.2d 145, 150 (9th Cir. 1980)). Where more than one  
4 rational interpretation concerning a plaintiff's credibility can be drawn from substantial evidence  
5 in the record, a district court may not second-guess the ALJ's credibility determinations. *Fair*,  
6 885 F.2d at 604. *See also Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) ("Where the  
7 evidence is susceptible to more than one rational interpretation, one of which supports the ALJ's  
8 decision, the ALJ's conclusion must be upheld."). In addition, the Court may not reverse a  
9 credibility determination where that determination is based on contradictory or ambiguous  
10 evidence. *See Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). That some of the reasons for  
11 discrediting a claimant's testimony should properly be discounted does not render the ALJ's  
12 determination invalid, as long as that determination is supported by substantial evidence.  
13 *Tonapetyan*, 242 F.3d at 1148.

#### 14 **B. Application of Standard**

15 Plaintiff testified that she has chronic back and leg pain radiating from her middle back  
16 through her knees. AR 43. Plaintiff also testified she has low energy, a loss of interest in  
17 activities, and thoughts of suicide as a result of her depression. AR 40. Plaintiff testified, as a  
18 result of these impairments, she "struggle[d] on a daily basis to do anything," and had difficulty  
19 caring for herself, her daughter, and performing household chores due to her pain. AR 37.  
20 Plaintiff also testified she leaves her house approximately twice per week, and has previously  
21 lost jobs because she was unable to get along with others. AR 40-42. The ALJ found Plaintiff's  
22 medically determinable impairments could reasonably be expected to cause some of the alleged  
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1 symptoms; however, the ALJ did not find *all* of the claimant's symptom allegations to be  
2 credible. AR 19.

3 Plaintiff argues the ALJ failed to offer clear and convincing reasons, supported by  
4 substantial evidence, for discounting her testimony. But, the ALJ cited Plaintiff's improvements  
5 with medication and therapy, as well as her noncompliance with her treatment regimen. *See* AR  
6 19, 495, 513-14, 546-49, 552 The ALJ also cited the lack of objective medical evidence to  
7 support Plaintiff's claims of disabling physical limitations, and activities of daily living which  
8 were inconsistent with her allegations of disabling limitations. AR 19, 414-22, 461, 499-500,  
9 515, 517, 597. These were clear and convincing reasons, supported by substantial evidence, for  
10 discounting Plaintiff's testimony. *See* 20 C.F.R. § 404.1529(c)(3)(iv) and (v); *Molina*, 674 F.3d  
11 at 1113; *Bray*, 554 F.3d at 1227; *Tommasetti*, 533 F.3d at 1039-40; *Regennitter v. Comm'r, Soc.*  
12 *Sec. Admin.*, 166 F.3d 1294, 1297 (9th Cir. 1998); *Morgan*, 169 F.3d at 600.

13 However, an evaluation of a claimant's credibility relies, in part, on an accurate  
14 assessment of the medical evidence. *See* 20 C.F.R. §§ 404.1529(c), 416.929(c). As discussed in  
15 Section I, above, the ALJ erred in evaluating the opinion evidence from Plaintiff's examining  
16 and consulting psychologists. As this case must be remanded for further proceedings in any  
17 event, the ALJ should also reevaluate Plaintiff's credibility anew on remand.

### 18 III. Whether the ALJ Provided Germane Reasons for Rejecting the Lay Witness Evidence 19 in the Record

20 In the Ninth Circuit, lay witness testimony is competent evidence and "cannot be  
21 disregarded without comment." *Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2009) (*quoting*  
22 *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996)). *See also* 20 C.F.R. § 404.1413(d), SSR  
23 06-03p, 2006 WL 2329939 at \*2. However, an ALJ may discredit a lay witness' testimony with  
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1 specific reasons “germane to each witness.” *Bruce*, 557 F.3d at 1115; *Turner v. Comm’r of Soc.*  
2 *Sec.*, 613 F.3d 1217, 1224 (9th Cir. 2010).

3 Here, Plaintiff’s ex-husband, Kenneth Lehw completed several function reports and  
4 provided a declaration in support of Plaintiff’s application. AR 338-46, 423-31, 434. Mr. Lehw  
5 stated Plaintiff was unable to work because she had conflicts with coworkers and supervisors,  
6 and had difficulty doing things others tell her to do. AR 423, 454. However, the ALJ gave little  
7 weight to Mr. Lehw’s statements, because they were “inconsistent with the [Plaintiff’s] ability  
8 to maintain a relationship with her current husband and to care for her small child. [They are]  
9 also inconsistent with [Plaintiff’s] ability to interact appropriately with her various healthcare  
10 treatment providers [AR 461, 480, 503].” AR 21. Inconsistency between a lay witness’  
11 statements and the medical record, as well as inconsistency between a lay witness’ statements  
12 and Plaintiff’s activities, are germane reasons to discount a lay witness, and the ALJ did not err  
13 by doing so here. *Bayliss*, 427 F.3d at 1218 (citing *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir.  
14 2001)). However, as the case must be remanded on other grounds, the ALJ should reevaluate the  
15 lay witness evidence in the record.

16 IV. Other Assignments of Error

17 In addition to the foregoing, Plaintiff contends the ALJ erred by failing to properly assess  
18 Plaintiff’s RFC, and by failing to properly evaluate Plaintiff’s ability to perform other jobs  
19 existing in substantial numbers in the national economy at Step Five of the sequential evaluation  
20 process.

21 As discussed above, the ALJ erred by failing to properly evaluate the opinions of four of  
22 Plaintiff’s examining and consulting psychologists. An ALJ’s failure to properly evaluate all of  
23 the medical opinion evidence may result in a flawed RFC finding. *See Hill*, 698 F.3d at 1162;  
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1 SSR 96-8-p, 1996 WL 374184 at \*2. Thus, the ALJ will necessarily have to re-evaluate  
 2 Plaintiff's RFC on remand, and proceed on to Steps Four and Five, as appropriate.

3 V. Whether the New Evidence Submitted to the Appeals Council Supports Reversal of  
 4 the ALJ's Decision

5 Plaintiff argues the Court should review additional evidence submitted to, but not  
 6 considered by, the Appeals Council. Dkt. 13, p. 16. The additional evidence consisted of 58  
 7 pages of medical records. *See, e.g.*, Dkt. 13, Exh.1. The Appeals Council reviewed the new  
 8 submission, but elected not to consider the evidence or include it in the Administrative Record:

9 We also looked at the medical record from Capital ENT dated May 21, 2014 and  
 10 May 27, 2014, the medical record from Capital Urology dated March 32, 2014  
 11 through August 28, 2014, the medical record from Hawk's Prairie Vision Clinic  
 12 dated August 6, 2014, the medical record Yelm Physical Therapy dated June 2,  
 13 2014, the medical record from TRA Medical Imaging dated April 11, 2014 and  
 July 31, 2014, and the medical record from Eastside Health Care dated October  
 1, 2013 through September 2, 2013. The Administrative Law Judge decided your  
 case through September 24, 2013. This new information is about a later time.  
 Therefore, it does not affect the decision about whether you were disabled  
 beginning on or before September 24, 2013.

14 AR 2. Plaintiff contends the Appeals Council's failure to include this information in the  
 15 Administrative Record violated the Social Security Act, Social Security Regulations, precedent  
 16 from *Brewes v. Comm'r of SSA*, 682 F.3d 1157 (9th Cir. 2012) and *Taylor v. Comm'r of Soc.*  
 17 *Sec. Admin.*, 659 F.3d 1228, 1231 (9th Cir. 2011), and procedures in HALLEX I-4-1-54. Plaintiff  
 18 requests the Court determine the evidence relates back to the relevant time period and was  
 19 erroneously excluded by the Appeals Council. Plaintiff also contends the additional evidence  
 20 shows the ALJ decision was not based on substantial evidence and reversal is required. Dkt. 13,  
 21 p. 16-18.

22 Sentence Six of 42 U.S.C. § 405(g) authorizes a reviewing court to remand a case to the  
 23 Commissioner "upon a showing that there is new evidence which is material and that there is  
 24

1 good cause for the failure to incorporate such evidence into the record in a prior proceeding.” 42  
 2 U.S.C. § 405(g); *See Melkonyan v. Sullivan*, 111 S.Ct. 2157, 2164, 501 U.S. 89 (1991). In light  
 3 of the fact the case is being remanded on other grounds, the Court need not decide whether  
 4 Sentence Six applies, nor whether Plaintiff has demonstrated the necessary requirements for a  
 5 remand under Sentence Six. On remand, the Commissioner is directed to evaluate the newly-  
 6 submitted evidence.

7 VI. Whether the Case Should be Remanded for an Award of Benefits or Further  
 8 Proceedings.

9 Plaintiff conclusorily argues the case should be reversed and remanded for the award of  
 10 benefits, rather than for further proceedings.

11 Generally, when the Social Security Administration does not determine a claimant’s  
 12 application properly, “the proper course, except in rare circumstances, is to remand to the agency  
 13 for additional investigation or explanation.” *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir.  
 14 2004) (citations omitted). However, the Ninth Circuit has established a “test for determining  
 15 when [improperly rejected] evidence should be credited and an immediate award of benefits  
 16 directed.” *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (*quoting Smolen*, 80 F.3d at  
 17 1292. This test, often referred to as the “credit-as-true” rule, allows a court to direct an  
 18 immediate award of benefits when:

19 (1) the ALJ has failed to provide legally sufficient reasons for rejecting such  
 20 evidence, (2) there are no outstanding issues that must be resolved before a  
 determination of disability can be made, and (3) it is clear from the record that the  
 ALJ would be required to find the claimant disabled were such evidence credited.

21 *Harman*, 211 F.3d at 1178 (*quoting Smolen*, 80 F.3d at 1292). *See also Treichler v.*  
 22 *Commissioner of Social Sec. Admin.*, 775 F.3d 1090, 1100 (9th Cir. 2014), *Varney v. Sec’y of*  
 23 *Health & Human Servs.*, 859 F.2d 1396 (9th Cir. 1988). Further, even if the ALJ has made the  
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1 three errors under *Harman* and *Smolen*, such errors are relevant only to the extent they impact  
2 the underlying question of Plaintiff's disability. *Strauss v. Commissioner of the Social Sec.*  
3 *Admin.*, 635 F.3d 1135, 1138 (9th Cir. 2011). "A claimant is not entitled to benefits under the  
4 statute unless the claimant is, in fact, disabled, no matter how egregious the ALJ's errors may  
5 be." *Id.* (citing *Briscoe ex rel. Taylor v. Barnhart*, 425 F.3d 345, 357 (7th Cir. 2005)). Therefore,  
6 even if the credit-as-true conditions are satisfied, a court should nonetheless remand the case if  
7 "an evaluation of the record as a whole creates serious doubt that a claimant is, in fact, disabled."  
8 *Garrison*, 759 F.3d at 1021 (citing *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2004)).

9 Here, outstanding issues must be resolved. Even if the additional limitations opined to by  
10 Dr. Wingate and the consulting psychologists were incorporated into the RFC, the record does  
11 not contain any vocational expert testimony which would establish Plaintiff would be unable to  
12 perform jobs which exist in substantial numbers in the national economy. AR 46-52. Thus, there  
13 is insufficient evidence in the record to establish Plaintiff should be found disabled as a matter of  
14 law, and the case should be remanded for additional proceedings. *See Harman*, 211 F.3d at 1180.  
15 *See also Treichler*, 775 F.3d at 1104-06.

### 16 **CONCLUSION**

17 Based on the foregoing reasons, the Court finds the ALJ erred by failing to consider Dr.  
18 Kester's opinion, and failing to properly evaluate Dr. Wingate's opinion. Therefore, the Court  
19 orders this matter be reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g). On  
20 remand, the ALJ should reevaluate the medical opinion evidence and lay witness evidence,  
21 reevaluate Plaintiff's credibility, reevaluate Plaintiff's residual functional capacity, and proceed  
22 on to Step Four and/or Step Five of the sequential evaluation as appropriate. The ALJ should  
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1 also develop the record as needed. Judgment should be for Plaintiff and the case should be  
2 closed.

3 Dated this 6th day of June, 2016.

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5 David W. Christel  
6 United States Magistrate Judge  
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